STATE OF MICHIGAN

COURT OF APPEALS

RICHARD S. HEALY,

Plaintiff-Appellant,

v

MOTORCITY CASINO,

Defendant-Appellee.

UNPUBLISHED
December 11, 2003

No. 243568
Wayne Circuit Court
LC No. 01-114323-CL

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition to defendant under MCR 2.116(C)(10). Plaintiff's complaint alleged that he was discharged from his employment in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* We reverse and remand.

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The court may grant the motion if the documentary evidence shows "that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

The moving party has the initial burden of supporting its position by submitting documentary evidence. *Id.* After the moving party meets its burden, the burden then shifts to the nonmoving party to set forth specific facts showing that a genuine issue of material fact exists, as opposed to mere allegations. *Id.*

In pertinent part, the WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about

> to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362.]

To establish a prima facie case under the WPA, a plaintiff must show that (1) he was engaged in a protected activity as defined by the act, (2) the defendant fired him, and (3) a causal connection existed between the firing and the protected activity. *Roulston v Tendercare (Michigan)*, 239 Mich App 270, 279; 608 NW2d 525 (2000). Defendant concedes that the first two elements of the prima facie case are not at issue in this appeal. Therefore, the only issue to be decided is whether plaintiff raised a genuine issue of material fact that a causal connection existed between the protected activity – plaintiff's participation in an investigation with the state Gaming Commission – and being fired.

Employers are entitled to objective notice of a report or a threat to report by a whistleblower. *Id*. Objective notice has been interpreted by the courts to mean that the employer or the person who fired the employee was aware of the protected activity in which the employee engaged. See *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257-258; 503 NW2d 728 (1993).

Plaintiff, an assistant slot shift manager with defendant, asserted that an employee of the state Gaming Commission, Paul Flaherty, asked plaintiff to assist in an investigation regarding a misplaced casino key. Plaintiff secured an internal document, met with Flaherty, and gave him the document. The day after the meeting, Flaherty stated to plaintiff that he hoped that plaintiff did not lose his job over the assistance plaintiff had given him. When questioned during his deposition about why he made this statement, Flaherty said, "At the time I felt that Erica [plaintiff's supervisor] may have been upset that I had a copy of [the internal] report."

Plaintiff asserted that Flaherty's statement about a possible firing (1) implied that defendant had been informed of the source of the internal report and (2) permitted an inference that defendant had objective notice that plaintiff had participated in the Gaming Commission investigation and fired him as a result. Defendant asserted that the decision to fire plaintiff was based on plaintiff's poor job performance and was made weeks in advance of his actual firing.

We conclude that plaintiff raised a genuine issue of material fact sufficient to survive defendant's motion for summary disposition. Indeed, Flaherty's remark about a possible firing, together with his testimony that he made this remark because he believed plaintiff's supervisor might be upset about the release of the internal report, permits a reasonable inference that defendant had notice about defendant's involvement with the Gaming Commission investigation. Although witnesses for defendant stated that plaintiff's name had not arisen during the meeting with Flaherty about the lost key and the internal report, and although Flaherty stated that it may or may not have arisen, the initial inference remains valid. This essentially is an issue of credibility, and a trial court may not weigh the credibility of witnesses in reviewing a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Moreover, plaintiff was fired the day after he engaged in the protected activity. The timing of plaintiff's firing creates an inference that he was fired because of his participation in the activity. Indeed, "[c]lose timing between the alleged protected activity and the termination of a plaintiff's employment may establish the 'causal connection' element of a plaintiff's prima facie case of retaliation . . . ." *Taylor v Modern Engineering, Inc,* 252 Mich App 655, 661; 653 NW2d 625 (2002). Additionally, plaintiff presented evidence that his firing was handled materially differently from that of another employee who was fired for poor job performance.

The close proximity between the protected activity and the firing, the evidence that defendant's firing was handled materially differently from that of another employee who was fired for poor job performance, the statement by Flaherty that he hoped plaintiff would not lose his job based on the aid he gave Flaherty,[1] and the statement by Flaherty that he believed plaintiff's supervisor may have been upset about the release of the internal document all permit a reasonable inference that defendant knew about the protected activity and fired plaintiff as a result. See, e.g., *Hall v McRea Corp,* 238 Mich App 361, 369-370; 605 NW2d 354 (1999), remanded on other grounds 469 Mich 919 (2001) (in reviewing a motion for summary disposition under MCR 2.116(C)(10), all reasonable inferences are to be drawn in the nonmovant's favor). Accordingly, plaintiff raised a genuine issue of material fact regarding the reason for his firing, and the trial court erred in granting defendant's motion for summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter

[1] We reject defendant's argument that the Flaherty's statement about a possible firing is inadmissible as a "stray remark" under the rationale of *Krohn v Sedgwick James of Michigan, Inc,* 244 Mich App 289; 624 NW2d 212 (2001). The statement occurred around the same time as the alleged discriminatory action, was not ambiguous, did not involve inflammatory language, and, significantly, did not suggest a general discriminatory bias but instead related to a discrete event (the meeting between plaintiff's supervisor and Flaherty). Under these circumstances, we cannot agree that *Krohn* mandates the exclusion of the statement from evidence. Cf. *Khron, supra* at 300-304. The situations are simply not analogous. We note that defendant does not challenge the admissibility of the statement on any other basis.